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No. 84-496

In the Supreme Court of the United States

OCTOBER TERM, 1984

EXPEDIENT SERVICES INCORPORATED, ET AL., PETITIONERS

v.

JAMES M. BEGGS, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
JUNE WAGONER EDWARDS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioners' claim that the Service Contract Act of 1965 discriminates against non-union employees has become moot because the petitioning employer has ceased doing business as a government contractor and the petitioning employees have joined a union.

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OPINIONS BELOW

The order of the court of appeals remanding the case for further proceedings (Pet. App. 19a) is reported at 721 F.2d 1323. The order of the court of appeals dismissing the appeal as moot (Pet. App. 23a) and the opinions of the district court (Pet. App. 1a-18a, 20a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1984, and a petition for rehearing was denied on June 18, 1984 (Pet. App. 24a-25a). On September 8, 1984, Justice Powell extended the time within which to file a petition for a writ of certiorari to and including September 27, 1984 and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(a) of the Service Contract Act of 1965 (SCA), 41 U.S.C. 351(a), provides:

> Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:
>
> (1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary [of Labor], or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.

Section 4(c) of the SCA, 41 U.S.C. 353(c), provides:

> No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such

service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

STATEMENT

1. In 1977, petitioner Expedient Services, Inc. (ESI) received a noncompetitive contract with the National Aeronautics and Space Adminstration (NASA) to perform maintenance work at the Kennedy Space Center (Pet. App. 2a). The contract contained a wage determination by the Department of Labor (Department) pursuant to the Service Contract Act of 1965, 41 U.S.C. 351 *et seq.*, reflecting the wages paid by the previous contractor under its collective bargaining agreement (Pet. App. A4).[1] See Section 4(c) of the SCA, 41 U.S.C. 353(c). ESI's maintenance employees were not unionized (Pet. App. 4a). For this reason, subsequent wage determinations for extensions of the contract were based on the prevailing wage rates in the locality, rather than the actual wages paid ESI's employees (*id.* at 4a-5a). See Section 2(a)(1) and (2) of the SCA, 41 U.S.C. 351(a)(1) and (2).[2]

Following expiration of the term of the contract, as extended by two option years, NASA elected in 1980 to reprocure the contract on a competitive basis. The Department issued a wage determination for the reprocurement

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[1]The Department's wage determination is the minimum amount that may be paid employees under a service contract. See 41 U.S.C. 351(a)(1), 353(c).

[2]Subsection (a)(1) applies to wages; subsection (a)(2) contains similar provisions with respect to fringe benefits.

reflecting the prevailing wage rates in the locality, which were lower than the rates paid the ESI employees. Under Section 4(c) of the SCA, had ESI's employees been unionized, the wage determination would have been based on their actual wage rates, unless after a hearing the Department determined that those rates were "substantially at variance" with the prevailing rates in the locality. Pet. App. 4a-5a.

2. a. Petitioners — ESI and a class of its maintenance employees — commenced this action in the United States District Court for the Middle District of Florida in January 1981, seeking to enjoin procurement of a new contract based on the Department's wage determination. They alleged that the wage determination for the reprocurement was invalid, contending that Section 4(c), on its face and as applied, deprived both ESI and the employee class of equal protection and the class members of their First Amendment right of association because employees and employers subject to a collective bargaining agreement received more favorable treatment than did those not subject to such an agreement (Pet. App. 6a-7a, 11a-15a).[3] They also challenged the constitutionality of Section 2(a)(1) and (2) on similar grounds. The court entered a temporary restraining order staying completion of the procurement (Pet. App. 6a).

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[3]Petitioners also alleged that the wage determination violated the Administrative Procedure Act in various respects; they later amended their complaint to challenge on contractual and constitutional grounds NASA's refusal to grant the employees a wage increase while the litigation was pending and a temporary restraining order was in effect. The district court rejected on the merits the constitutional and statutory claims of the employee class (Pet. App. 15a-18a), ruled that the contractual claim was within the exclusive jurisdiction of what was then the Court of Claims (*id.* at 17a), and concluded that ESI's challenge to the wage determination was moot (*id.* at 8a-9a). Petitioners did not challenge these holdings in the court of appeals and do not appear to do so before this Court.

When the case was not ready for trial before the TRO was scheduled to expire, the parties stipulated that NASA would not award the contract pending a ruling by the court. During this period, ESI and its employees continued to perform the maintenance work at Kennedy Space Center. Following expiration of the term of the proposed maintenance contract, NASA withdrew the disputed reprocurement in the spring of 1982. It announced at that time that the maintenance contract would be included in a larger base-wide procurement to be awarded in January 1983. Pending that award, NASA offered, and petitioners accepted, the opportunity to continue performing the maintenance work at the Center. ESI was not qualified to bid and did not bid on the base-wide operations contract. Pet. App. 6a.

b. Following a nonjury trial in August 1982, the district court issued its decision on October 1, 1982. The court dismissed the constitutional claim of ESI, ruling that ESI did not have standing because, in view of the fact that it was not qualified to bid on the base-wide contract, it "d[id] not have a personal stake in the outcome of this action" (Pet. App. 9a). The court did find that the employee class had standing to raise its constitutional claims, reasoning that members of the class might be hired by the new contractor and paid less than they would receive had they been unionized under ESI, and that it could fashion a remedy to redress the injury if it found for the class on the merits (*id.* at 10a).[4] On the merits, however, the court ruled that Sections 2(a)(1), (2) and 4(c) of the SCA are constitutional (Pet. App. 11a-15a). It concluded that Section 4(c) allowed members of the class, if they desired, to challenge a wage determination based on a prior union contract where the union wage

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[4]The court did not specify the nature of such a remedy.

rates were significantly different from those prevailing in the locality.[5] Accordingly, union employees would not necessarily receive more favorable treatment than non-union employees. To the extent that challenges to union wage determinations were not being raised, the SCA gave "union employees benefits which they do not deserve," but that did not "entitle [petitioner employees] to have equally improper wage determinations issued to cover their contract" (*id.* at 15a).

3. a. Petitioners appealed solely with respect to the district court's rulings that ESI lacked standing and that the challenged sections of the SCA are constitutional. While the appeal was pending, the base-wide contract was awarded and most of ESI's maintenance employees became employed by the new contractor. They elected to become subject to an existing collective bargaining agreement to which the new contractor was a party. Pet. App. 27a. In light of these developments, respondents filed a "Suggestion of Mootness, or alternatively, Request for Remand." The court of appeals, while retaining jurisdiction, remanded the case to the district court for the limited purpose of "making * * * additional findings surrounding the issue of mootness" (Pet. App. 19a).

b. On remand, the parties engaged in further discovery and submitted a joint stipulation to the district court (Pet. App. 26a-30a). The stipulation established that ESI was no longer a NASA contractor and that "substantially the same employees" who were members of the class were now employed by the base-wide contractor and had "elected" to become members of a union (*id.* at 27a). The district court accepted respondents' arguments that petitioners now lacked standing and that their constitutional claims had

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[5]The district court applied the same analysis to wage determinations for contract extensions under Section 2(a)(1) and (2) (Pet. App. 12a-13a). See S. Rep. 92-1131, 92d Cong., 2d Sess. (1972).

become moot (*id.* at 20a-22a). In an unpublished order, the court of appeals, "[b]ased upon the record on remand," dismissed the appeal as moot (*id.* at 23a).

ARGUMENT

Petitioners do not challenge the district court's ruling on the merits of their claim, nor do they allege that there is a conflict on this question. Indeed, no other court appears to have addressed the issue. The district court plainly was correct in concluding (Pet. App. 11a-15a) that the Service Contract Act does not discriminate against non-union employees because it provides an adequate means of ensuring that wage determinations for unionized employees do not vary substantially from those made for other employees. See Section 4(c), 41 U.S.C. 353(c).

1. The petitioning employees contend (Pet. 11-25) that their challenge to the law is not moot because they are now receiving lower wages and fringe benefits than they would be receiving had they been members of a union when employed by ESI.[6] The finding of mootness by both courts

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[6]Petitioners make an unsupported allegation (Pet. 12 & n.6) that ESI's claim is not moot. This contention is without merit, as the district court held in its initial opinion (Pet. App. 9a). The injury ESI alleged was that it would not be able to compete on the reprocurement because it was paying higher wages than the other bidders would be required to pay under the wage determination. But that reprocurement was withdrawn, and ESI was not eligible to bid on the succeeding one. Hence, ESI did not suffer any injury from the operation of the SCA. It does not now claim to be subject to a realistic possibility of future injury.

Petitioners also allege (Pet. 17-18, 20, 24) that their First Amendment rights have been chilled by the possibility of lower wage determinations in the future. This claim is insubstantial, especially in light of the employees' earlier decision to decertify the union while employed by ESI (see Pet. App. 4a): if they were able voluntarily to vote against union representation then, there is no reason why they cannot do so now. In any event, the district court's factual finding (Pet. App. 22a) that petitioners have now voluntarily chosen union representation disposes of their claim of a chilling effect, which necessarily rests on an assertion that they joined the union involuntarily.

below is fully consistent with this Court's precedents and presents no novel legal issues. Petitioners' factbound claim to the contrary does not merit this Court's review.

Petitioners' reliance on their alleged continuing injury misconceives the basis for the courts' conclusion that their appeal is moot. The district court was willing to assume arguendo (Pet. App. 21a) that the employees were receiving benefits lower than they would be receiving had they been unionized at ESI, but concluded that the case had become moot because it could not now grant relief that would benefit them (*id.* at 22a). Petitioners sought only a prospective determination that the statute is unconstitutional.[7] Even if this could benefit non-union employees (but see page 9, *infra*), it would be of no assistance to petitioners, who are now unionized.[8] A prospective declaration that the statute is unconstitutional simply would not now benefit them: it could increase neither the wage determinations petitioners received in the past as non-union employees of ESI nor those that they are now receiving as union members. Petitioners nowhere address this fundamental point. Their claim has become moot.[9] See, *e.g.*, *Murphy* v. *Hunt*, 455 U.S. 478, 481-482 (1982); *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 396-397 (1980); *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969).

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[7]Petitioners did not seek damages for past injuries resulting from the allegedly unconstitutional operation of the SCA.

[8]Petitioners represent a class of the former employees of ESI, not of all non-union employees of federal contractors (Pet. App. 1a).

[9]Petitioners' claim obviously is not "capable of repetition, yet evading review." See, *e.g.*, *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2 (1972). The union or non-union status of particular employees of government contractors does not change so swiftly as to prevent court review of a challenge by non-union employees. Indeed, petitioners themselves were not unionized for a period of some five years. Nor is this case similar to *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974), where

2. In any event, the economic injury alleged by petitioners — receipt of lower wage determinations because of their non-union status — could not have been redressed by a judicial determination that the challenged portions of the SCA are unconstitutional. The provisions of the SCA that petitioners challenge were added by Congress in 1972. See Pub. L. No. 92-473, § 1(a) and (b), 86 Stat. 789. Prior to that time, all wage determinations were made on the basis of the rates prevailing in the locality. See Pub. L. No. 89-286, § 2(a)(1) and (2), 79 Stat. 1034. If the different treatment accorded unions under the 1972 amendments were determined to be unconstitutional, all wage determinations would be made, as they were before, by reference to the rates in the locality. See *Reitz* v. *Mealey*, 314 U.S. 33, 39 (1941); *Davis* v. *Wallace*, 257 U.S. 478, 485 (1922). This is precisely the treatment that petitioners received as non-union employees. They are receiving no less now. Any relief would merely invalidate an advantage given unionized employees; it would not confer a like advantage on those not unionized. Indeed, the district court recognized as much (Pet. App. 14a). Accordingly, even when petitioners were non-union employees of ESI, their claimed injuries would not have been redressed by a determination that the 1972 amendments to the SCA are unconstitutional.

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the challenged government action was "not contingent" and had, "by its continuing and brooding presence," adversely affected the petitioners (*id.* at 122). Here, by contrast, the challenged action is contingent on, among other things, a failure to apply the Section 4(c) proviso in particular circumstances. See pages 5-6, *supra*. Moreover, the mere existence of the statute has not had a substantial chilling effect on petitioners. See note 6, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
JUNE WAGONER EDWARDS
Attorneys

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